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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 367

W. C. JARRETT, L. DAVIES, W. E. JOCELYN, ET AL.,
Petitioners,

vs.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a Corporation, also Known as Norfolk Housing Authority

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

Leigh B. Penn,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of W. C. Jarrett and others respectfully show to this Honorable Court:

A

Summary Statement of the Matter Involved

This case involves the Number One Current Problem of the nation—Public Housing:

(1) The rents to be charged, and

(2) Whether or not a housing authority must obtain the subsidy afforded by the government to make the rent "at the lowest possible rates." (Quotation from statute.)

The appellants (for the most part sailors, rank of Seamen to Chief Petty Officers), are tenants of Merrimack Park, a public housing project of approximately five hundred apartments, owned and operated by Norfolk Housing Authority, the appellee, which was built in 1941, through the financial means of the United States Government under the provisions of the United States Housing Act (42 U. S. C. A. 1401-1430).

In 1941, the Housing Authority fixed the rents.

On September 1st, 1945, the appellees increased the rent approximately fifty per cent.

On July 1, 1947, again the appellees increased the rent, substantially.

No increase in salary or income was granted the non-commissioned Naval military personnel who occupied the project with their wives and children, unlike the defense workers who made large incomes during the war by overtime work.

To the additional increases of rent (1945 and 1947) the sailors instituted proceedings to have declared the same as erroneous, under the declaratory judgment provision. (Section 274, paragraph (d) of the Judicial Code.)

B

Reasons Relied On for the Allowance of the Writ

1. This is a case of first impression in the United States, and of momentous concern.

2. That the local housing authority erroneously failed to comply with the formula provided for by the contract with Federal Public Housing Authority in violation of Article III, Section 3.07.

> "Sec. 3.07. Operation of Project Without Profit. The Local Authority covenants that the Project will not be

operated for profit and that it will fix the rentals for dwellings in the Project at rates sufficient, but no higher than sufficient, to produce Revenues which (together with the annual contributions provided for herein and all other available moneys) will be adequate (a) to provide for the payment, as the same become due, of the principal of and interest on the Bonds, (b) to meet Operating Expenses, and (c) to discharge any other obligations arising under this Contract or the Resolutions."

Also Article E.—Annual Contributions by FPHA.

"The FPHA hereby agrees to make annual contributions to the Local Authority during the period, in the amounts, in the manner, and subject to the provisions, set forth in the General Covenants and Conditions. For the purposes of said provisions one and three-tenths per centum (1.3%) shall be the 'Fixed Contribution Percentage'."

3. That the local housing authority erroneously failed to obtain the annual contributions provided for in the contract with the FPHA under Articles V and VI. (Pages 123 to 138 of the transcript of the record.)

4. That the intent and purpose of the fixing of rentals, when rented to sailors as the facts are here provided that the Navy Department fix the rentals, as provided in 42 U. S. C. A. 1504.

5. That the increased rentals will provide revenue sufficient to discharge all the costs of the project within twenty-five to thirty years in violation of the cardinal purpose to provide rent "at the lowest possible rates", with bonds whose maturity may not exceed sixty years. (Reference to pages 98 and 99 of the transcript of the record.)

6. That the Housing Authority, the appellee, is accountable to:

(1) Tenants,

(2) Bondholders,

(3) Citizens of Virginia and the United States of America, and the appellants have a privity of contract by reason of their special status, and the appreciation of the Government in adopting this legislation. No reserve can be had except as provided by statute which is as follows. (Sec. 3145(9) Code of Virginia:

> "(c) to create (during not less than the six years immediately succeeding its issuance of any bonds) a reserve sufficient to meet the largest principal and interest payments which will be due on such bonds in any one year thereafter and to maintain such reserve."

7. That under familiar principles, the appellees failed to provide such an answer as would entitle it to a summary judgment on the pleadings. Here—there is no showing that the Housing Authority in its answer has complied with the regulations or that it was operating without any profit, or that the proper reserve was deducted or that the certified statement indicates that the rent was "at the lowest possible rates".

8. Foremost for the consideration of this Court is the question of subsidy. Shall a Housing Authority be compelled to accept subsidy in Virginia and in New York State a subsidy shall not be necessary? The purpose of the statute was that the rental rates should be uniform throughout the country; the same in Virginia as in California—certainly the rate of pay of the enlisted men who rent in Virginia is the same as it is in California, in Maine or in Louisiana—the same allowances and the same rate of pay.

C

Jurisdiction

The date of the judgment to be reviewed is August 10th, 1948 and is reported in 169 Fed. 2d, page 409 (No. 4 Advance sheets) and 74 Federal Supplement 585. This Court has appellate jurisdiction by virtue of Title 28 U. S. C. A., Section 344-350.

D

The date of the judgment to be reviewed is August 10th, 1948 and jurisdiction of the court is presented under United States Housing Act, U. S. C. A. Title 42, Section 1401-1430, and Title 42, Sections 1501-1564. The procedure for a declaratory judgment is pursuant to Section 274, paragraph (d) of the Judicial Code as Amended, U. S. C. A. Title 28, Section 400.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 5742 W. C. Jarrett, et als., Appellants vs. Norfolk Redevelopment and Housing Authority, a Corporation, also known as Norfolk Housing Authority, Appellee, and that the said judgment of the United States Circuit Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the

premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

W. C. JARRETT, ET ALS.,
By LOUIS B. FINE,
Counsel for Petitioners;
A Member of the Bar of the
Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES

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No. 367

W. C. JARRETT, L. DEVRIES, W. E. JOCELYN, ET AL.,
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NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A CORPORATION, ALSO KNOWN AS NORFOLK HOUSING AUTHORITY

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Court Below

The opinion in the United States Court of Appeals for the Fourth Circuit is reported in *W. C. Jarrett, et als., Appellants,* v. *Norfolk Redevelopment and Housing Authority, a Corporation, also known as Norfolk Housing Authority, Appellee,* and the opinion for the United States District Court is reported in 74 Federal Supplement 585, and the Circuit Court in 169 F. (2) 409 (No. 4 Advance Sheets).

II

Jurisdiction

1. The date of the judgment to be reviewed is August 10th, 1948.

2. The appellant respectfully represents that the lower court erred in entering a summary judgment directing the dismissal of their complaint.

3. The procedure for declaratory judgment is pursuant to Section 274, paragraph (d) of the Judicial Code as amended, USCA, Title 24, Section 400, and the jurisdiction of this court is presented under the United States Housing Act, USCA Title 42, Section 1401-1430, and Title 42, 1501-1564.

4. There are no adjudicated cases, but this section involves the construction of a "low rent housing" project (42 USCA 1401-1430) which was converted into a project for the housing of persons engaged in defense activities. 42 USCA 1501, *et seq.* This latter statute provides for this change of purpose. See 42 USCA 1504.

III

Statement of the Case

A partial statement of the case has already been given under the heading "A" in Petition for Writ of Certiorari, and in the interest of brevity, will not be repeated. The additional facts are as follows:

The facts necessarily are based on the pleadings filed in this action as no evidence *ore tenus* was heard by the court. A declaratory judgment was asked to determine whether two rent increases, to-wit: the July, 1945, increase, and a proposed increase of July 1st, 1947, are legal and proper.

There are approximately five hundred apartments, or family units built on a public housing project known as Merrimack Park. It is built on a tract of land just across the street from the East gate of the Naval Air Station in Norfolk. During the war and ever since completion of the project in 1941, occupancy of the Merrimack Park has been confined and limited to military personnel, most of whom are Naval personnel, and personnel who are non-commissioned officers, to-wit: from (the lowest grade) Seaman, to (the highest grade) Chief Petty Officers. The same tenants who have become veterans were permitted to remain on the premises.

The defendant corporation was organized pursuant to the Virginia Housing Authorities Law, Section 3145, paragraph (1), *et seq.*, of the Code of Virginia. The Virginia Housing Authorities Act of 1938 *(supra)* was passed pursuant to the United States Housing Act of 1937 (42 USCA, Section 1401 *et seq.*).

IV

The United States Housing Authority had its powers broadened in 1940 in connection with the ever increasing demand for the housing of persons engaged in national defense, and Section 1504 et seq. was passed by Congress (Title 42).

The appellee did obtain the financial assistance of the United States Government under the provision of the United States Housing Act (42 U. S. C. A. 1401-1430) and entered into a contract with the Federal Public Housing Authority by virtue of this financial assistance. The project, although originally intended for low rent housing as a part of the program of slum clearance, was converted immediately for tenants or persons engaged in defense activities as provided under the provisions of Title 42, U. S.

C. A., Section 1501, *et seq.* For this reason, Merrimack Park, by reason of the war, was tenanted by non-commissioned Naval personnel.

On September 1st, 1945 and on July 1st, 1947, the rents prevailing in the Merrimack Part project were raised substantially, to-wit; almost a total of ninety per cent since the original occupancy by the tenants. The appellants therefore contend that the appellees contravened the statute in raising the rents.

The appellee asserts it has sole and unrestricted discretion in all matters of administration of this project, including the fixing of rents, and that the tenants have no right to be heard or complain, and that this is entirely a matter between the appellee and the Federal Public Housing Administration (Page 48, Item 2, "Motion to Dismiss" Transcript of Record).

IV

Specification of Errors

1. The Circuit Court erred in affirming the judgment of the District Court in entering summary judgment directing the dismissal of the appellants complaint.

2. The lower court erred in not directing that the appellee be required to take advantage of the subsidy.

3. That under the pleadings in this case, the lower court erred in directing the summary judgment in that the answer of the appellee did not set forth facts and figures indicating that the project was not operated without profit, nor was any statement of receipts and expenditures appended thereto to justify the dismissal; that said answer merely provided for conclusions of law based upon no statement of facts or figures.

V

Argument

Section 3145, Paragraph (8), Code of Virginia (1942), provides *inter alia* that the appellee shall have the power "• • • Subject to the limitations contained in this chapter to establish and revise the rents or charges • • •." In the same chapter, under Section 3145(9), entitled "Operation not for profit":

> "It is hereby declared to be the policy of this Commonwealth that each housing authority shall manage and operate its housing projects in an efficient manner so as to enable it to fix the rentals for dwelling accommodations at the lowest possible rates consistent with such authority providing decent, safe and sanitary dwelling accommodations, and that no housing authority shall construct or operate any such project for profit, or as a source of revenue to the city or the county. To THIS END AN AUTHORITY SHALL FIX THE RENTALS FOR DWELLINGS IN ITS PROJECTS AT NO HIGHER RATES THAN IT SHALL FIND TO BE NECESSARY IN ORDER TO PRODUCE REVENUES, WHICH (TOGETHER WITH ALL OTHER AVAILABLE MONEYS, REVENUES, INCOME AND RECEIPTS OF THE AUTHORITY FROM WHATEVER SOURCES DERIVED) WILL BE SUFFICIENT (a) TO MEET THE COST OF, AND TO PROVIDE FOR, MAINTAINING AND OPERATING THE PROJECTS (INCLUDING THE COST OF ANY INSURANCE) AND THE ADMINISTRATIVE EXPENSES OF THE AUTHORITY: (b) TO PAY, AS THE SAME BECOME DUE, THE PRINCIPAL AND INTEREST ON THE BONDS OF THE AUTHORITY: AND (c) TO CREATE (DURING NOT LESS THAN THE SIX YEARS IMMEDIATELY SUCCEEDING ITS ISSUANCE OF ANY BONDS) A RESERVE SUFFICIENT TO MEET THE LARGEST PRINCIPAL AND INTEREST PAYMENTS WHICH WILL BE DUE ON SUCH BONDS IN ANY ONE YEAR THEREAFTER AND TO MAINTAIN SUCH RESERVE."

From this paragraph, it will be noted from a fair construction of the same, that the Housing Authority must operate its business:

(1) For the Housing Authority,

(2) For the bond holders,

(3) For the general public; that is, the City of Norfolk, Commonwealth of Virginia, and the United States of America, as well as the individual tenants.

Specifically, no reserve can be set up except as expressly provided in this section; to-wit; "* * * a reserve sufficient to meet the largest principal and interest payments which will be due on such bonds in any one year thereafter and to maintain such reserve."

Under Section 3145, Paragraph (10), the authority may rent the property to persons only of a low income, and not to accept any person whose aggregate annual income is in excess of five times the annual rental of the quarters, except that in the case of families with three or more minor dependents, such ratio shall not exceed six to one, and included in the rental shall be the annual cost of utilities. It therefore appears with unusual clarity that the appellee was compelled by operation of law to operate and establish rentals only on the basis of the hereinabove mentioned statutes.

The contract between the appellee and the Federal Public Housing Authority, specifically Article 3, Section 501, provides:

> "To assist the local authority in achieving, maintaining and assuring the low rent character of the project, the FPHA agrees, subject to the provisions hereinafter contained, to make annual contributions to the local authority."

Section 307 of the contract is as follows:

> "The local Authority covenants that the Project will not be operated for profit and that it will fix the rentals for dwellings in the Project at rates sufficient, but no

higher than sufficient, to produce revenues which (together with the annual contributions provided for herein and all other available moneys) will be adequate (a) to provide for the payment, as the same become due, of the principal of and interest on the Bonds, (b) to meet Operating Expenses, and (c) to discharge any other obligations arising under this Contract and the Resolutions."

This contract, it is respectfully submitted; is not merely a contract between the FPHA and the appellee. It is a contract made for the benefit of the tenants, and the tenants have a right to complaint of a breach of covenant in the contract between the appellee and the FPHA.

On the subject of "Contracts and Writing", Section 5768, Code of Virginia (1943), permits the beneficial owner of any contract to maintain an action in his own name. It is respectfully contended and urgently insisted that there is no discretion on the part of the defendant to fix its rentals. The rentals are fixed entirely pursuant to Section 3145(9) of the Code of Virginia (*supra*) and pursuant to the Federal statutes; not by virtue of any contract, discretion or voluntary action on the part of the appellee with the FPHA.

Under Title 42, U. S. C. A., Section 1504, entitled "Rental Rates; Exemption from Limitations of National Housing Act of 1937", in part provides:

"Any contract made for financial assistance under sections 1401-1430 of this title may be revised so as to provide that the project involved will be assisted for any of the purposes of sections 1501-1505 of this title. The Navy or War Department or the Authority, in the administration of any project developed for the purposes of sections 1501-1505 of this title, shall fix rentals for persons engaged in national defense activities and their families which will be within their financial reach, and the Authority, in any contract

for financial assistance or any lease of such a project, shall require the fixing of such rentals. * * *"

"* * * During the period when the President determines that in any locality there is an acute need for housing to assure the availability of dwellings for persons engaged in national defense activities, dwellings in a project developed or assisted in said locality which are devoted to the purposes of providing housing for persons engaged in national defense activities shall not be subject to subsections (1) and (2) of section 1402 of this title, and during such period such projects shall be deemed projects of a low-rent character for the purposes of any of the applicable provisions in Title I of the United States Housing Act of 1937. June 28, 1940, c. 440, Title II 204, 54 Stat. 683."

Reading this section, with Section 1402, it will be seen that the appellee had no right to fix the rental and in this particular case, the Navy Department, nor the War Department, nor the FPHA fixed the rental, but the appellee did so.

The appellee further contends that the Office of Price Administration had approved the raising of the rents and cite that if this approval was unfair or erroneous, that the exclusive remedy would only be to file a complaint with the Emergency Court of Appeals. To this contention, we respectfully submit that this is erroneous, when the very Act under the Office of Price Administration excludes specifically projects of this kind.

Under Section 204 of the contract between the appellee and the FPHA, amortization for the maturity of any bond is specifically stated not to exceed sixty years from the date of this contract.

A liberal and fair interpretation, consonant with the Act, would necessarily mean that a project of this kind should not be paid for any quicker or earlier than had to be under the provisions of the law, and if an outside limit of

sixty years was placed thereon with the idea of giving the people the lowest possible rent, then would it not be inconsistent and strange to say that the project could be paid for in fifteen years or twenty years, and still call it low rental property.

It is respectfully submitted that it is the duty of the appellee to show that its accounting did not exceed the amount of reserve, expenditures, income and revenue which were all set up as provided under Section 3145, Paragraph (9) of the Code of Virginia, and that there was no discretion on the part of the appellee. It was required to follow the plan as best suited the people consistent with the plan of financing set forth by the Statute of Virginia and the Federal Government.

It is significant to bring to the attention of this Honorable Court that there is nothing in the record, to-wit; the answer, the motion to dismiss and summary judgment, to indicate the necessity at the time for the increase of the rental and the bonds had never been issued for any increase in interest or principal, but that the appellees might do so or would probably do so. In the meantime, upon probability and possibility, and without any authority in law, the rents were raised and in defiance and in opposition of "the lowest possible rents consistent with providing decent, safe and sanitary dwelling accomodations." Section 3145(9).

Under Section 3145(10), Code of Virginia, the statute requires the tenants to pay rentals "within their financial reach". It is to be further observed that in 1945 when the rentals of the Seaman and the Navy man up to the Chief Petty Officer were increased, his allowance was not increased by the United States Government, and again in 1947 when the appellee again raised the rent of the Seaman and the Chief Petty Officer, he did not receive any increase in allowances or pay. Are they not entitled to special

consideration for the service to their country? Was not the law passed to take care of this very situation? Was not the Navy Department required to fix the increased rentals? Is the contract between the appellee and the FPHA subject only to action to be taken by either one of those parties, or was the contract passed for the benefit of the enlisted men?

The sustaining of the motion to dismiss, we respectfully urge, constituted error. The statement by the appellee that it was doing what the law stated, was a conclusion of law and certainly not a statement of fact. It was incumbent in their answer to definitely show an operation statement:

1. That the project was not operated for profit,

2. That only sufficient reserve was held as prescribed by the statute,

3. Statement which could be analyzed that would indicate that it had received the subsidy,

4. That after receiving the subsidy, that the project was rented at the "lowest possible rates". This requirement of a balance sheet is required under Rule 12, Paragraph (c) on Motion for Judgment on the Pleadings.

In *Gibbs* v. *Buck*, Fla. 1939, 59 S. Ct. 725, 307 U. S. 66, 83 L. Ed. 1111:

> "A motion to dismiss bill in injunction suit attacking constitutionality of a state statute on ground that cause of action is not stated should be denied if factual allegations raise grave doubt of constitutionality of statute in mind of trial court."

In *Hovenden* v. *City of Bristow*, D.C. Okl. 1940, 34 F. Supp. 674:

"On motion to dismiss complaint, all inferences must be resolved against the movant."

In *Lehigh Coal & Navigation Co.* v. *Central R. of New Jersey*, D. C. Pa. 1940, 33 F. Supp. 362:

"A motion to dismiss is limited to allegations of complaint, and on such a motion, which is equivalent of a demurrer, the court is called upon to interpret the allegations and to accept all such allegations as true and to determine whether the complaint presents a cause of action."

In *Jacobs* v. *Peavy-Wilson Lumber Co.*, D. C. La. 1940, 33 F. Supp. 206:

"In action for injunction against violation of section 201 *et seq.* of Title 29, Labor, wherein motion to dismiss on ground of unconstitutionality of the act and of its administrative enforcement was based on numerous grounds, each of which might be sufficient to sustain the motion if substantiated by evidence and not left to factual conjecture, motion to dismiss would be denied without prejudice and referred to the merits."

In *Chandler* v. *Cutler-Hammer, Inc.*, D. C. Wis. 1940, 31 F. Supp. 451:

"Judgment should not be granted on the pleadings if there is any question of fact involved."

We earnestly contend there was a question of fact under the pleadings in this case as to the justification of the increase of rents.

Summary of the Argument

Point A. The appellee has no discretion except to carry out the mandatory terms of the statute under Section 3145, Paragraph (8), Code of Virginia (1942), and Section 3145, Paragraph (9) entitled "Operation Not For Profit."

Point B. That the appellee was compelled to obtain the subsidy as provided in the contract between the Federal Public Housing Authority, and specifically Article 3, Section 501.

Point C. The appellee was compelled to rent the project at rentals only sufficient to provide principal and interest, operating expenses, and other obligations for a period not to exceed sixty years.

Point D. The answer of the appellee did not justify a dismissal on a motion on the pleadings because the answer of the appellee stated conclusions of law and not facts or figures. (No operating statement attached to the answer.)

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise of this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals, Fourth Circuit, and finally reverse it.

Respectfully submitted,

LOUIS B. FINE,
Counsel for Petitioner.

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No. 367

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NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A CORPORATION, ALSO KNOWN AS NORFOLK HOUSING AUTHORITY,
Respondent

REPLY BRIEF FOR PETITIONERS

I

Not waiving any Assignment of Error treated in the Petition, but insisting thereon, yet wishing to avoid mere repetition, this reply brief will concentrate on the following errors:

The court erred in directing the summary judgment, in that the answer of the Housing Authority failed to show any statement of facts and figures, and stated a conclusion of law.

The brief for the Housing Authority quotes *Section 1410(b)* of *Title 42, United States Code Annotated* (Pages

8 and 9, Opposition Brief) and places therein three asterisks. That portion which is omitted, we respectfully submit, is the "meat of the cocoanut." The section is quoted in full, and the portion omitted is italized.

> "Annual contributions shall be strictly limited to the amounts and periods necessary, in the determination of the Authority, to assure the low-rent character of the housing projects involved. Toward this end the Authority may prescribe regulations fixing the maximum contributions available under different circumstances, giving consideration to cost, location, size, rent-paying ability of prospective tenants, or other factors bearing upon the amounts and periods of assistance needed to achieve and maintain low rentals. *Such regulations may provide for rates of contribution based upon development, acquisition or administration cost, number of dwelling units, number of persons housed, or other appropriate factors: Provided, That the fixed contribution payable annually under any contract shall in no case exceed a sum equal to the annual yield, at the going Federal rate of interest at the time such contract is made plus 1 per centum, upon the development or acquisition cost of the low-rent housing or slum-clearance project involved; And provided further, That all such annual contributions shall be used first to apply toward any payment of interest or principal on any loan due to the Authority from the public housing agency.*" (Italics ours.)

Section 1504 was then the formula for which the Housing Authority was compelled to adopt, which is as follows:

> "Any contract made for financial assistance under sections 1401-1430 of this title may be revised so as to provide that the project involved will be assisted for any of the purposes of sections 1501-1505 of this title. The Navy or War Department or the Authority, in the administration of any project developed for the purposes of sections 1501-1505 of this title, shall fix

rentals for persons engaged in national defense activities and their families which will be within their financial reach, and the Authority, in any contract for financial assistance or any lease of such a project, shall require the fixing of such rentals. Projects developed by the Navy or War Department, or developed or assisted by the Authority, for the purposes of sections 1501-1505 of this title shall not be subject to the elimination requirements of sections 1410(a) and 1411(a) of this title, or to any provisions of section 1409 of this title which would require any part of the development cost thereof to be met in any manner other than from funds loaned or furnished by the Authority. Funds expended for the purposes of sections 1501-1505 of this title shall be excluded in determining, for the purposes of section 1421(d) of this title, the amounts expended within each State. Except as otherwise provided in sections 1501-1505 of this title or as may be inconsistent with sections 1501-1505 of this title, all the provisions of title I of the United States Housing Act of 1937 shall apply to sections 1501-1505 of this title. During the period when the President determines that in any locality there is an acute need for housing to assure the availability of dwellings for persons engaged in national defense activities, dwellings in a project developed or assisted in said locality which are devoted to the purposes of providing housing for persons engaged in national defense activities shall not be subject to subsections (1) and (2) of section 1402 of this title, and during such period such projects shall be deemed projects of a low-rent character for the purposes of any of the applicable provisions in Title I of the United States Housing Act of 1937. June 28, 1940, c. 440, Title II, 204, 54 Stat. 683."

Thus it will be seen that the Office of Price Administration had nothing to do with the rejection or the approval of the rent.

II

The court erred in not directing the Housing Authority to take advantage of the subsidy. The Housing Authority admits that it did not take advantage of the subsidy (Third paragraph, page 15). The Housing Authority's brief admits that a government project (to use the words, page 18 of the brief) "Benmoreell Park—a somewhat similar development nearby" is a project in which sailors have not had to meet the two increases imposed upon them. This is the only comparable project to Merrimack Park in the entire State of Virginia, and the statute does not permit that mere chance of one sailor getting in Benmoreell would have to pay much less than one sailor in Merrimack Park, especially where both parties are drawing the same salary and from the same employer, the United States Navy. This subsidy (the intent and purpose of Congress) was to make comparable situations of this sort on an even keel.

In *Brand* v. *Chicago Housing Authority,* (C. C. A. 7, 1941) 120 F. 2d, 786, cited in the brief of the Housing Authority, is in fact authority for the petitioners in that the court therein decided that the Chicago Housing Authority was entirely proper and right in maintaining public housing for the benefit of low income individuals, and that the rents were based on a low income basis and not to permit tenants with large incomes to reside in said project. *A fortiori* in the case at bar, the very purpose was to have the Housing Authority obtain the subsidy in order that the rents may be on a level with comparable projects; to-wit, the Benmoreell Park.

The President's finding that the Norfolk area was one in which an emergency situation arose, demanded a different

application than any of the other projects operated by the Norfolk Housing Authority (Paragraph 3 of record, page 51). The Merrimack Park project was a class unto itself, solely for sailors and their families.

The Housing Authority's brief says that if they had appended an operating statement, it would have shown that there was no necessity for a subsidy (Page 15 of Housing Authority's brief). This, we respectfully submit, is one of the assignments of error, in that there was no operating statement or calculation made, and we respectfully submit that a subsidy is in order and should have been in order. It may be said that the Housing Authority operates other projects and is the Merrimack Park project separate and apart from the other projects? The President's Executive order defined this project as an exceptional one (Paragraph 3, record, page 51).

It is a far cry from justice and the intention of the statute to have one sailor whose financial circumstances are the same as any other sailor in the same United States Navy, to have to pay one rent in one government financed project, and another in another government financed project. Was it not the intention of the Congress to place the enlisted men on the same basis?

The answer, we respectfully submit, is in the affirmative, that both should be treated equally, especially when Section 1504 of the amended law authorizes the USHA to direct the loan limit of these projects from the original loan of 90% of the cost to 100%.

We submit that for the reasons stated in the petition, and some thereof emphasized in this brief, the petition for a writ of certiorari should be granted and judgment entered for the petitioners, or at least a new trial granted, with

pleadings and proceedings in an ordinary manner, so that justice may be done.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 367

W. C. JARRETT, L. DEVRIES, W. E. JOCELYN, ET ALS.,
Petitioners,

v.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, a Corporation, also Known as Norfolk Housing Authority,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

Petitioners as tenants of a public housing project called Merrimack Park laid complaint in the District Court at Norfolk, Virginia, for a declaratory judgment over the validity of two increases in their rentals. The first increase occurred in 1945 and evoked no suit. The second, two years later, produced the existing litigation with their landlord, Norfolk Redevelopment and Housing Authority, defendant-respondent herein. The

case is brought to this court on the order which sustained defendant's motion for summary judgment on the pleadings. (For the District and Circuit Court opinions, see 74 Fed. Supp. 585, and 169 Fed. 2nd 409).

The issues being thus dependant upon the pleadings, require no great factual elaboration in any event and none at this point beyond what is recited in the petition and supporting brief. We therefore turn at once to a consideration of the statutes which govern the focal points of the controversy. An understanding of what we would prefer to call the public housing formula will, it is believed, lead to a ready appreciation of the case.

ARGUMENT

The Statutes

Merrimack Park was conceived, designed, constructed, and is operated and owned by the Norfolk Redevelopment and Housing Authority. Since the object of the litigation is to review and upset the rentals put into effect by the Norfolk Housing Authority (as it is sometimes called), it is not amiss to consider in some minutia what that body is, who created it, how it operates, and what its rights and powers are.

The Virginia Housing Authorities Law was adopted by the Legislature in 1938. See Va. Code (Michie) Section 3145(1) et seq. The Act authorized each city and county to create a political subdivision of the Commonwealth to be known as "the Housing Authority" of the given city or county. The mechanics provided were that upon resolution of the city council or county board of supervisors finding and declaring that insanitary or

unsafe dwelling accommodations existed, or that there was a shortage of safe and sanitary accommodations for persons of low income (as defined), a housing authority for the given locality could begin to function. It thereupon devolved upon the mayor or board chairman to appoint five commissioners of the authority to serve without pay.

The law imposes upon these public corporations the primary responsibility for making investigations to determine where slum areas exist, and recommendations respecting slum clearance.

The Virginia Act accords housing authorities elaborate corporate powers. By subsection (8) they may borrow money, execute contracts, sue and be sued, acquire, lease, manage and dispose of property, and what is of importance here, "establish and revise the rents or charges therefor."

Subsection (9) is of particular significance in this case (R. p. 173). It charges the defendant housing authority (which was duly organized by resolution of the Norfolk City Council in 1940) to "manage and operate its housing projects in an efficient manner so as to enable it to fix the rentals * * * at the lowest possible rates consistent with * * * providing decent, safe and sanitary dwelling accommodations * * *. To this end an authority shall fix the rentals for dwellings in its projects at no higher rates than it shall find to be necessary in order to produce revenues which (together with all other available moneys (*sic*) * * * * from whatever source derived) will be sufficient to (a) meet the cost of, and to provide for, maintaining and operating the projects (including cost of insurance) and the adminis-

trative expenses of the authority; (b) to pay, as the same become due, the principal and interest on the bonds of the authority; and (c) to create * * * * a reserve * * * *".

The next section (10) limits authorities in the kind of tenants that may occupy their projects (R. p. 172). In general, they must be persons of low income (as defined) who are to be charged rentals *"within their financial reach."* The law then goes on to prohibit the renting of accommodations to families who have an aggregate annual income in excess of five times the rental (and in cases of families with three or more children, six times the rental). We thus see that a minimum or "floor" is placed under rentals so as to insure private enterprise against the kind of competition that would result from giving persons of modest income inordinately cheap housing.

Subsection (3) (j) defines persons of low income to "mean persons or families who lack the amount of income which is necessary (as determined by the authority undertaking the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without over-crowding." Here again, it may be observed, is a positive delineation of the power of a Virginia housing authority to decide not only who may occupy its projects, but what such persons can pay for occupancy, in its administrative discretion.

Virginia housing authorities also have the right of eminent domain, and may issue bonds to the public. Their bondholders are specifically authorized to proceed against them by way of mandamus to compel per-

formance of all the requirements of law (Subsection 17).

In 1942 the Virginia Legislature came along and broadened the functions of housing authorities. They were additionally empowered to develop housing accommodations for "persons engaged in national defense." In the same breath the amendment (Subsection 27) eliminated the rent "floors" imposed by subsections (10) and the second part of (9). "Persons engaged in national defense" may therefore be charged *less* than one-fifth of their income, but on the other hand, the same restriction carries over that rentals shall not be beyond their "financial reach." The difference between the two classes of tenants is important here: under the original scheme "persons of low income" could be expected to meet one scale of rentals at Merrimack Park, whereas under war-time conditions "persons engaged in national defense" obviously could afford quite a different scale. Necessarily, greater revenues were anticipated for and by local housing authorities over such a period of national emergency. Defense-housing was contemplated as a temporary affair, however, and at the end of the emergency it is provided that projects will return strictly to their "low-rent" status.

By State law we accordingly see that the defendant has the capacity to operate Merrimack Park as a housing project for service personnel, free and unhampered by the minimum rent limitations applicable to slum clearance projects. It is obligated, by statute, not to make a profit on the one hand, and on the other, to be self-sustaining and self-liquidating. Irrespective of profit or loss, however, the authority is governed by the

elementary requirement which forbids exaction of rates beyond the "financial reach" of either class of tenant. But naturally, a given rental within the "financial reach" of a chief petty officer having longevity allowances may be quite another thing for a second class seaman just out of boot camp, even though both may occupy similar quarters in the same housing project. Adjustment of rates in such disproportionate circumstances is, as we shall see, arranged through a so-called hardship formula, hereafter mentioned.

The State law is devoid of limitation on the date of maturity of bond issues. To that extent complete latitude is left to the commissioners in determining sinking fund and reserve provisions for their securities. Doubtless it was contemplated that financial assistance extended from Washington would be conditioned upon terms, in this connection, agreeable to the Federal agency administering the funds. At all events, by State law local housing authorities are free to pay off their debts as rapidly as they see fit and are able to do so within the other limits of law previously discussed. The war boom manifestly advantaged them in this connection: they were enabled (if not obliged) to rent accommodations in many projects to persons of greater financial resources; the increased "financial reach" of those persons consequently admitted of more latitude to housing authorities in the realization of revenues from rent. But increased revenues over the war period will not enable the Norfolk Authority to accelerate its amoritization program, which remains at 60 years (Answer, R. p. 42). As a matter of fact, they will hardly allow it to keep up with the staggering load of

maintenance brought about by the current monetary inflation. It is no secret that such things as refrigerators, for instance, will cost three times their original 1940 lot price to the Authority. Reserve accounts for such replacements have had to be, of course, adjusted accordingly.

The Norfolk Authority operates several projects in the city and it may be observed that the responsibilities resting upon the five commissioners are not inconsiderable. By law, they must play their cards close to the chest—no profit, and no loss. The prediction and calculation of future operating costs, future debt service, the money market, the general economy of the country, and other such matters are manifestly all a part of their charge and burden, not to mention wisdom. Just how our housing authorities manage to operate without loss on modest rentals is, of course, where the Federal government steps into the picture. But before turning to the Federal statutes, it is well to note in passing that the communities themselves participate in and bear a part of the cost. As a political subdivision of the Commonwealth the Norfolk Authority is tax-free. Under subsection (21) communities are authorized in effect to meet the requirement of Federal law (Title 42 U. S. Code Ann. Sec. 1410(a)) that an amount equal to at least 20% of the annual Federal subsidy be contributed in the form of cash or tax remissions and exemptions.

The Virginia Housing Authorities Act of 1938 was but a sequel to the United States Housing Act of 1937.

In this legislation (42 USCA Section 1401 et seq.) Congress created the United States Housing Authority

to prime the pump for slum clearance on a local scale. The Federal Authority was authorized, among other things, to make loans to local public housing authorities and annual "contributions", or to utilize the means of capital grants—all, of course, for specific projects approved by the government. (This latter method, we understand, has never been put to use).

The government's approval under this original legislation was limited strictly to slum clearance work. That is to say, section 1402 defines "low rent housing" to mean dwellings available only for "families of low income" whose net income must not exceed five times the rental, or in cases of families with three or more dependents, not more than six times the rental. By the same token as the Virginia Act, "families of low income" are defined to be persons in the lowest income group who cannot afford to pay enough rent to cause private enterprise to build an adequate supply of safe and sanitary homes.

Section 1409 lays down a loan limit of 90% of the approved cost of a project; it prescribes the minimum interest rate; and then completes the scheme by requiring that all loans "shall be secured in such manner, and shall be repaid within such period not exceeding 60 years, *as may be deemed advisible by the Authority*" (Italics ours).

The heart of the public housing formula is expressed in section 1410 (b):

> "Annual contributions shall be strictly limited to the amounts and periods necessary, *in the determination of the Authority,* to assure the low-rent character of the housing projects involved. Toward

this end the Authority may prescribe regulations fixing the maximum contributions available under different circumstances, giving consideration to cost, location, size, *rent-paying ability of prospective tenants*, or other factors bearing upon the amounts and periods of assistance needed to achieve and maintain low rentals * * * Provided, That the fixed contribution payable annually under any contract shall in no case exceed a sum equal to" (the going interest rate to the government, plus 1 per cent). (Italics ours.)

When war overtook the country the scope of the U. S. Housing Authority was broadened. Utilizing the facilities of an existing agency, Congress in 1940 directed the USHA to turn its attention to the growing demand for housing of persons engaged in national defense. In localities where the President determined that an acute need existed—and Norfolk was obviously one of those places where the needs were most pressing—the Authority was told to step in and "develop" or "administer" or "extend financial assistance" to local authorities. The Navy and Army could likewise call for its cooperation and assistance.

Section 1504 of the amended law goes further and authorizes the USHA to amend its contracts with local housing authorities so as to divert embryo slum clearance projects into dwellings for the Army, Navy and defense workers. When assistance in that direction is given, the loan limit of 90% of cost is increased to 100%; moreover, the rental limitations imposed by the government (that is, either the Army or Navy if owned by either, or USHA if owned by a local authority) must fix, or require the fixing of, rentals

"within the financial reach" of this new class of tenants. In other words, and as in the case of the Virginia statute, the rental minimum (one-fifth) was eliminated for defense workers but the maximum remained his "financial reach."

The Housing Authority of the government is given —and required to exercise—a measure of control over the projects it sponsors. Various devices are spelled out in the statutes to give it the power necessary to compel a project to be returned to the low-rent scheme: in specified events of default there are remedies such as termination of subsidy, automatic increase in interest rates, and of course, foreclosure.

The Contract

The Norfolk Authority's contract for financial assistance from the government is a lengthy document but only the general tenor and theory of the arrangement need explanation here.

At first glance we see that the project in question is not intended for slum clearance during the emergency (Par. 6, R. p. 53). Quite to the contrary, we observe the recital of the President's finding that Norfolk is an area wherein an acute shortage of dwellings exists for defense personnel, and that Merrimack Park is an approved type of project for that purpose (Par. 3, R. p. 51). Therefore the Federal Public Housing Authority (a consolidated agency which has taken over the functions of the USHA by presidential proclamation) commits itself in the contract to make annual contributions in aid of carrying on the project. And exactly how the project is to be carried on, or managed,

is the subject of the voluminous Part II or supplement to the contract, which goes into great detail concerning operational matters such as the all-important subject of rent. Sections 3.06, 3.07 and 4.05 of Part II are especially pertinent here (R. pp. 103 and 37). (Parenthetically, the index printed at the beginning of the contract may be of assistance to the court in perusing and correlating its provisions.)

It is quite apparent that in the scheme of things set forth in these sections of the contract, the government stands to benefit from successful operation of a project. Its "contribution" or subsidy is not fixed: only an annual maximum is prescribed on a sliding scale (R. p. 57). To the extent solely of closing the gap between profit and loss does the government participate by sudsidy; if successful management narrows the gap or closes it, no subsidy is required and FPHA is the happier. Successful management, however, may not exceed the bounds laid down by law. These bounds, as the court will see, are incorporated in much detail into the government contract. Hence the party most directly concerned—the government—cannot lawfully or contractually permit a local authority to depart from the "Low-Rent Character of the Project." (See R. pp. 133-4-5).

To make the point abundantly plain, Judge Barksdale in the trial court quoted from Section 5.03 of Part II as follows:

> " 'To assure that the annual contributions will be strictly limited to the amounts and periods necessary, and in view of the fact that it is anticipated that *no annual contributions may actually be neces-*

sary during the War Housing Period, the contribution to be paid on each Annual Contribution Date shall be calculated as follows: * * *" (Italics mine.)"

Why, it may be queried, are no contributions from the government anticipated over the War Housing Period? We have already seen that contributions are highly contingent—dependent upon need. As intimated above, the "financial reach" of war-housing tenants was expected to be such that rentals alone would carry the project. Only to the extent that they do not, does the need for subsidy arise. And the government, holding the purse-strings, is naturally to be the final arbiter on this question of need.

In addition to the defendant's word, the record further contains a statement under oath from FPHA that the contract at bar is in all respects being met by both parties. Beyond this, we have before us the uncontroverted fact that the scale of rentals in effect at Merrimack Park—including the two increases therein—have been submitted in advance to and approved by both FPHA and OPA (R. pp. 24, 33 and 34).

In approving the scale of rentals, the government was obliged to rely upon facts and administrative determinations certified by the local authority respecting the financial ability of its tenants. Not only do we see that it certified the application of a so-called "hardship formula" whenever some family might be unable to meet the new scale (R. pp. 25 and 31), but the Court will observe that within its four corners the record is bare of claim that the rent of a single one of the plaintiffs is beyond his financial reach. Such being

the fact, it is difficult to perceive how present tenants can justifiably complain that future tenants may eventually pay less rent than they. The whole set-up contemplates that, as the tenants well know, at the end of the defense-housing period they will all become ineligible for occupancy and persons of less means will take their places—with rentals correspondingly reduced and the subsidy commencing to take effect.

It would be, perhaps, treading on the merits of the case to explain why the rent was increased at Merrimack Park. Appellee's answer, nevertheless, explains that up until 1947 the Authority had been taking advantage of low interest rates by making its borrowings on short-term notes. The time was rapidly approaching, in the then estimation of the five commissioners, when the money market would drop; therefore if savings below the government's proffered interest rate of 2½% were to be gained, long-term bonds should promptly be offered the public. The immediate difference in interest charges would approximate two percent, or $40,000, which is $6.00 per month per unit at Merrimack Park. As the actual raise averaged $7.52 per unit, the Court can appreciate how closely the Authority calculated the enormously increased operating and maintenance costs for the 500 dwelling units in question.

It so happens that subsequent events have fully borne out the judgment of the commissioners on the money market. So serious an undertaking, however, as the permanent financing of the project has for obvious reasons been held in abeyance pending the outcome of this suit. Meanwhile the money market shows no signs of departing from its present trend, and the refinancing

operation will undoubtedly become more expensive than had been thought a year and a half ago.

The Case at Bar

Housing authorities have a wide discretion—and are in duty bound—to adjust rentals from time to time in the light of changing conditions

It is perfectly true that the housing shortage is a national problem; and admittedly, the claims and contentions made in this litigation can find no counterpart in a decided case. But this is not to say that the instant appeal raises any more significant, or more novel, question than the right of a local housing authority to raise its schedule of rentals, once set. Indeed, the petition appears to postulate the whole argument on the rather amazing premise that public housing rentals should be uniform throughout the nation.

Rationalizing the contention as best we may, it seems to be founded upon two ideas. First, it is said that law requires the government to grant, and local authorities to demand, the maximum subsidy at all times, willy-nilly. Evidently to round out a thesis, it is next claimed that the 60-year period prescribed in the statute as the limit within which local authorities must contract to repay construction loans, is a minimum limit, or rather a fixed term, instead of an outside figure or maximum.

That the statutes impose no such radical absolute as compulsory subsidy, requires no elaboration beyond what was said by Judge Parker in the Court of Appeals below. Nor was Judge Barksdale in the District Court able to read into the Housing Act an ironclad 60-year

amortization period. What counsel really means to complain about here is that, as the law only prescribes a maximum period of 60 years, it is theoretically possible for local authorities to adopt a much shorter period. The feasibility of a particular authority arranging a somewhat shorter term was, no doubt, visualized by Congress, but it is perfectly apparent that the legislation was surrounded by adequate safeguards to prevent this feature from being abused to the point of interfering with the low-rent character of a project. The fact of the matter is that the congressional mandate is quite explicit (see section 1410(b) quoted at page 8 of this brief). At all events, however, respondent's sworn answer alleging that a 60-year sinking fund had been set up for Merrimack Park, and approved by FPHA, renders the point moot.

The remaining contention is to the effect that an issue of fact was raised on the pleadings, hence the motion for summary judgment should not have been sustained. If we analyze the argument correctly, it follows the notion that respondent's answer (R. p. 40) resorted to asseverating mere conclusions, whereas if calculations and operating statements had been appended, the absence of subsidy would have become apparent and, what is more, respondent's affirmative denial of making a profit on the project could have been arithmetically tested.

It has all along been conceded that the subsidy is not now being received for Merrimack Park.

On the basis of the rents disclosed in this record, it would be difficult to take seriously an outright charge that Merrimack Park is producing a profit, even with

subsidy. The largest apartments, having four bedrooms, now bring $51 per month, including utilities—*which is one dollar and seventy cents a day.* Be that as it may, no such charge was advanced in the petitioners' complaint. A reference to that paper shows that the whole theory of the case rested upon misconceptions of the public housing formula long since discarded. Unfortunately, the tenants started off by thinking that the Navy had some control over their situation and could lawfully impose its schedule of rentals on Merrimack Park (Complaint, R. p. 64). Unfortunately, too, they seem to have misread State and Federal law into fixing a maximum rental of one-fifth of their income (R. p. 63), whereas it is actually a minimum. Such a minimum was inserted into the law for reasons manifestly other than to protect tenants; in fact, it can frequently work a hardship upon them. Brand et al v. Chicago Housing Authority (CCA 7, 1941), 120 Fed. (2d) 786, concerns very much the reverse of the situation here. In that case the low-rent tenant was protesting a *reduction* because it had the effect, under this provision of law, of rendering him ineligible for occupancy. His rent had suddenly been reduced to less than one-fifth of his income. The tenant's eviction on that account was upheld.

Aside from the now abandoned catch-all allegation respecting utilities and service charges, the complaint was so framed as almost to invite demurrer. Instead of any specific criticism of the manner and method of operating Merrimack Park, the pleader relied upon allegations that rentals are "fixed by law" or "fixed by the Navy" (R. p. 63), that "the defendant contends it has the right to raise rents" whereas "plaintiffs aver

they are subject to" certain features of the law claimed to standardize rentals (R. p. 64). In conclusion a declaratory judgment is prayed, holding illegal the increases and, by way of consequential relief, awarding judgment for the overcharges.

If there is one thing as to which the housing acts give tenants, as such, a right to complain, it is the specific provision which holds down rentals to their financial reach or capacity to pay. But not one tenant of Merrimack Park has seen fit to vouch his financial circumstances on such a contention. This is not just because of a liberal application of the so-called hardship formula at Merrimack Park (R. pp. 24, 25, 31, 32), but for the very compelling reason that the new schedule of rentals has been found by OPA to be well within the standard for comparable accommodations in the city of Norfolk (R. p. 34). This, of itself, should dispel counsel's wild assertion that the rents have been increased "almost 90%".

Facing these facts, it is no wonder that the petitioners fall back on the time-worn strategy of insinuating that the Authority's books and financial statements might not show a necessity for increasing revenues. In demanding the right to review the Authority's administrative determinations, they evidently find it difficult to accept a denial of that right without a co-extensive demonstration of what its concession would entail.

Fishing expeditions of this sort have been the subject of frequent condemnation by the courts. Nowhere is the law better stated than in the closing paragraph of Judge Parker's opinion, as follows (R. p. 178):

"The fixing of rentals was a matter intrusted by law to (fol. 97) the discretion of the defendant authority, not to the courts (Brand v. Chicago Housing Authority, 7 Cir., 120 F. 2d 786, 788). The authority was clothed with the duty of fixing rents in the light of the standards prescribed by the statutes and contract referred to; and this, of course, required the exercise of a high order of business judgment and a wide discretion. The courts have no more power to interfere with the exercise of this discretion than with the discretion vested in a public service commission to fix rates. Only where the authority has transcended its legal powers, violated rules of law or abused its discretion may the courts intervene."

The real motivation behind this litigation is touched upon by Judge Barksdale in the District Court. For a time Merrimack Park voluntarily followed the rent schedule which the Navy put into effect in its own project, Benmoreell Park—a somewhat similar development nearby. For reasons which the Navy apparently could ignore, the Norfolk Authority found it necessary to depart from an equal footing with Benmoreell in 1945. When in 1947 a further departure was put into effect, this was evidently too much for mutual Navy friends in the two projects to comprehend. Their lack of understanding, of course, lies in their understandable failure to appreciate that Benmoreell is government-owned and owes no debt; besides which, the Navy is under no compunction to make Benmoreell break even, particularly at the expense of the morale of its people.

CONCLUSION

Having traveled rather circuitously, we thus get back to the essential feature of the case, which is that, far from giving the tenants in a defense housing project a guaranteed or nation-wide scale of rentals, the law imposes on all authorities which partake of the public till the responsibility, first of all, for making their projects a financial success in their own varying communities. The statutes rest upon and in these housing agencies a necessarily wide scope of discretion and decision. Indeed, the whole theme of public housing is that the government will step in and foot the bill if and only if local agencies are unable to make both ends meet. This surely is a far cry from according the recipients of public housing—as these tenants are—a right to participate in the determination of rentals. We do not suppose that this court or any other would lightly assume to substitute its opinion for the collective judgment of the five commissioners, in a matter of providing enough income to meet all the obligations of what is manifestly a sizeable business undertaking. Especially so, when it is plain that tenants must contribute their share—up to a point—irrespective of profit or loss*. There being no controversy over exceeding that point, the complaint in this case amounts to no more than wishful thinking.

This brief has been designed to reduce the somewhat complicated public housing formula to the plainest terms, in an effort to demonstrate the cardinal

* We have several times used the expression "profit and loss" in this brief. It is not meant to convey what actually does not exist—a true profit. Our intention is merely to signify the difference between breaking even and sustaining a deficit in operations.

principle that it really subsidizes the tenant only when and to the extent he needs subsidizing. No matter how much he may like the idea of subsidization, he has not shown any necessity for increasing the public burden here. So long as he is able to pay—within the limitations on his resources prescribed by law—a rental which will sustain the project in which he lives, then the subsidy is rightfully minimized and the tenant has no just cause of complaint. Quite palpably, it is up to the local authority and the government jointly to decide, within the bounds of discretion, how much subsidy is needed. To repeat, there has been no suggestion of an abuse of discretion on the part of either in this connection.

The judgment of the courts below admits of no other conclusion on the public housing formula, and should not be disturbed.

Respectfully submitted,

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